Sir WILLIAM HAMILTON gives also the following opinion we cannot adopt: "We have no more right to say that the brain *feels* at the *finger points*, as consciousness assures us, than to assert that it *thinks* exclusively in the brain." Let us examine this proposition: When *I know* that I feel, I am aware it is not in my finger the operation of knowing took place; there was a sensation which must not be mistaken for a *perception*. Everybody knows a sensation does not generally determine its cause, but the perception analyzes its conditions and leads to the conception. But supposing, with Sir WILLIAM, that nerves are only *elongated brains*, although it is quite in opposition with anatomy, what would be the advantage of such opinion? True, we are then at a loss to know where the seat of intelligence may be, but it is not its seat that would give us a light on the nature of insanity—whether purely spiritual or exclusively material—and that is the important question. Now, the somato-psychical theory confesses the *unknown relation of soul and matter in the human mind.* Evidently, the material side of the question has more chances of solution if we admit the presence of the soul in the nervous centres and not in the extremities. There, only, the soul necessarily objectivates itself as having acted in the perception and sensation.

We finish this first part by acknowledging that if it had not been for the elaborate and very clear essay of Mr. Wetmore we would not have been able, for our own benefit, to disentangle the intricacy of laws and statutes on insanity, and especially to know anything about their history. In a future communication the more complicated cases of testamentary capacity, relative to positive insanity, will be examined. J. P.

RECENT AMERICAN DECISIONS.

Supreme Judicial Court of Maine.

THE YORK COUNTY M. F. INS. CO. *vs.* A. O. BROOKS.

Where a surety to a bond signs upon the assurance that the principal will also procure two other persons, specified and known to such surety, to sign the bond before he delivers the same, which he fails to do, but this is wholly unknown to the obligee at the time he accepts the bond, such surety is bound to perform the obligation.

Where the third surety upon a bond signs under the belief that the former signatures are genuine, but one of them is, in fact, forged by the principal in the bond, who erases such forged signature before he delivers the same to the obligee, who is wholly ignorant of these facts at the time, such surety cannot defend against the obligation.

APPLETON, C. J.—The defendant, A. O. Brooks, having been employed by the plaintiffs, as their agent to collect their outstanding assessments, gave them the bond in suit as security for the faithful performance of his trust. The plaintiffs received it ignorant of any agreement between him and the other defendants, or of any relations between them other than those arising from their respective signatures. Brooks having failed to pay over the moneys collected, the plaintiffs seek to enforce the bond in suit for the purpose of obtaining indemnity for the loss sustained.

John W. Perkins, the first surety on the bond, claims to be discharged because he "signed it on the promise of A. O. Brooks, that he would procure the signature of Robert G. Perkins," which he failed to do. The existence of this promise was unknown to the plaintiffs, and it is no fault of theirs that it was broken. This defendant neither signed the deed on condition nor delivered it as an escrow. He relied upon the promise of his principal, and he is not the first surety and probably will not be the last, who has found a reliance on such promises like leaning upon a broken staff. He undoubtedly expected the promise to be performed, but the disappointment of his expectations constitutes no answer to the plaintiffs' claim. When a bond is signed and delivered without any condition or reservation annexed, although under an expectation that it would be signed by others, it is the deed of the person signing, though it should not be signed by those whom he expected to sign it: *Haskins* vs. *Lombard*, 16 Maine 140. So, too, where a note payable to a bank was signed by the principal and one surety, an agreement on the part of the principal with such surety, that he will procure another surety, which is not done, before he procures the note to be discounted, constitutes no defence unless the officers of the bank were conusant of such agreement: *The Passumpsic Bank* vs. *Goss*, 31 Vermont 315; *Dixon* vs. *Dixon*, 3 Vermont 450.

It is admitted that the name of Robert G. Perkins, affixed to the bond, was a forgery, and was erased therefrom before its delivery to the plaintiffs, and that there was no appearance of his name on the bond when delivered, nor that it had ever been there.

The other defendant, John Perkins, alleges that he "signed the bond on the faith of the name of Robert G. Perkins, whom he knew to be a man of property," but, as that was a forgery, he denies his liability. But it was his neglect that he was ignorant of the genuineness of the signatures which preceded his own. He imposed no conditions limiting the legal effect of his signature. A surety on a bond cannot interpose as a defence against paying for the defaults of his principal that the name of another surety upon the same bond was obtained by fraud, unless the signature of the latter was a condition by which to obtain that of the former: *Franklin Bank* vs. *Stevens*, 39 Maine 533. Perkins made no conditional signature, nor was there a conditional delivery. A subsequent surety is not to be discharged because the name of a prior one has been forged. His own signature is an implied assertion on his part of the genineness of those preceding it, for it is not to be presumed that a man would affix his name to a bond when the prior names were forged. It was held in *Selser* vs. *Brock*, 3 Ohio 302, that one who signed a note, apparently as principal, but who was, in fact, a surety within the knowledge of the holder and affixed his signature after the names of others, as signers had been forged upon the note, and while it was in the hands of him for whose benefit it was drawn, so far sanctioned and affirmed the genuineness of the signatures, that he could not take advantage of the fraud in his defence against the holder, unless he show the holder was privy to the same. 1 Parsons on Notes and Bills 235.

The name of Robert G. Perkins was erased before the bond was delivered to the plaintiffs. They never knew it had been fraudulently affixed, nor of its subsequent erasure. Such alterations only as are material will defeat a bond. The forgery imposed no liability on the person whose name was forged. Its erasure neither released nor discharged him from any. The surrender of

a fictitious and forged bond for the benefit of the surety, to whom the same was of no possible use, except as a matter *in terrorem*, affords no ground upon which a court of equity will decree the exoneration of a surety: *Loomis* vs. *Fay*, 24 Vermont 240. The defendants would have been liable had the erasure not been made. The erasure has in no respect altered their rights nor affected their liabilities. Their liability still continues.

Defendants defaulted.

We are indebted to the courtesy of Chief Justice APPLETON for the foregoing opinion, and it seems to us to embrace some points of considerable practical interest. We had occasion to advert to the general subject, in a brief note to Seely *vs.* The People, 2 Law Reg. N. S. 344, 346. But the points presented in the present case arise somewhat differently, and the decision of the court here is not, perhaps, entirely in consonance with that of the court of Illinois, in that case.

I. The first question made in this case seems to us entirely one side of the principle upon which it is attempted to be placed by the defence. That one who signs a bond, as surety, upon the assurance of his principal, that he shall also have other responsible co-sureties which are never procured, and the bond nevertheless delivered, is deceived and defrauded of his indemnity, no one can question. But whether he shall himself bear the loss, or visit it upon the obligee, is quite a different question. And it seems to us, upon principle, that where there is nothing upon the face of the paper, indicating that other co-sureties were expected to become parties to the instrument, and no fact brought to the knowledge of the obligee before he accepts the instrument calculated to put him on his guard in regard to that point, and which would naturally have led a prudent man, interested in the opposite direction, to have made inquiry before accepting the security, the fault cannot be said to rest, to any extent, upon the obligee.

And, on the other hand, where the surety intrusts the bond to the principal obligor in perfect form, with his own name attached as surety, and nothing upon the paper to indicate that any others are expected to sign the instrument in order to give it full validity against all the parties, he makes such principal his agent, to deliver the same to the obligee, because such is the natural and ordinary course of conducting such transactions. And if the principal, under such circumstances, gives any assurances to the surety, in regard to procuring other co-sureties, or performing any other condition before he delivers the bond, and which he fails to perform, the surety giving confidence to such assurances must stand the hazard of their performance, and cannot implicate the obligee in any responsibility in the matter, unless he is guilty of fraud or rashness in accepting the security.

It seems to have been held in a majority of the American cases, that, in order to put the obligee upon inquiry even, some indication upon the face of the paper, such as the insertion of other names in the body of the bond, or some memorandum attached to the signature

of the surety, indicating the condition upon which he signed, should exist, or else some notice in *in pais* to the obligee, which might fairly be regarded as equivalent. And that without this the obligee is not chargeable with any positive default; and if there has been default on the part of the obligor, the bond may be enforced.

II. But the great difficulty arises upon the correlative question in the case, that is, how far the sureties have been guilty of any such want of care and prudence in the manner of giving their signatures as to estop them from showing that the bond, as to them, was an incomplete instrument, and, in fact, delivered, as far as there was any delivery, merely as an escrow. For if there has been no legal fault on the part of the obligor, the bond certainly cannot be enforced against them. And it must be confessed that the recent English decisions, and especially that of Swan *vs.* The North British Australasian Company, 10 Jur. N. S. 102 (1864), in the Exchequer Chamber, bear very much in favor of the sureties in this bond. This case was tried before the Court of Exchequer, 8 Jur. N. S. 940; and the same question was also tried before the Common Pleas, 7 C. B. N. S. 400, and finally, after very careful and patient examination, decided in the Exchequer Chamber, before the Lord Chief Justice COCKBURN, and six of the pusine judges, all, except KEATING, J., concurring in the decision.

It was here held that where A. was induced by his broker to send him blank forms of transfer, which the broker filled up with numbers and descriptions of shares different from those of the company intended by A., being shares in the defendant's company, and by means of a duplicate key, which he had procured to be made without the knowledge of A. obtained certificates from a box of A.'s, necessary to perfect the transfers; and he also forged the names of the attesting witnesses. In an action against the company for damages, and for a mandamus to restore the plaintiff's name to the register, it was held that the acts of the plaintiff were not such as estopped him from showing that the deed of transfer was a forgery.

It must be conceded that many of the American cases, in attempting to follow out the principle of the case of Lickbarrow *vs.* Mason, 2 T. R. 70, that whenever one of two innocent persons must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it, have held many parties estopped from showing the true state of the facts in their defence, upon much slighter grounds than the late English cases require. The principle of these American cases is fairly brought to view by the manner of putting the case by KEATING, J., in his dissent from the other judges, that one who, by his culpably negligent act, enables his agent to commit a fraud to the prejudice of third persons, by fabricating a transfer of the shares in question, is justly estopped from defeating the effect of such transfer by showing that it was made contrary to his expectations.

This view of the question will unquestionably sustain the decision in the principal case. But when it is considered, on the other hand, that this whole ground has been so thoroughly reviewed by two of the superior courts in Westminster Hall, and in the Exchequer Chamber also, and so very recently, and with the same result, in all the other courts, it cannot fail to raise grave doubts in the minds of the American courts, who have followed the opposite view, whether there be not some fallacy in the extent to which they are

pushing the doctrine of estoppels *in pais* upon the mere ground of negligent omission. The English courts are, of late, certainly requiring something more than mere omission and negligence to create an estoppel *in pais*. It must be conduct amounting to an implied license, or else it must be wilful and fraudulent: Patchin *vs.* Dubbins, Kay 1.

We confess to a strong inclination, in questions affecting specialties and simple contracts not negotiable, to favor the English rule. It seems to us that too many of the American cases, in striving to require good faith and diligence of the obligor or promissor, have quite too much overlooked the corresponding obligations on the part of the obligee. We can see no good reason why the obligee, who, in accepting the bond, trusts to the representations of the principal obligor as to the execution of the instrument by the others, who are known to stand as mere sureties, should be any more entitled to screen himself from the consequences of those representations proving false, than should the obligor. The true rule in such case seems to be that each party may stand upon *the facts of the case*, unless he has been guilty of *fraudulent misconduct*. This is certainly the present English rule upon the subject, and the one which we believe will ultimately prevail in this country.

I. F. R.

New York Court of Appeals.

ELISHA B. MORRELL *vs.* THE IRVING FIRE INSURANCE COMPANY.

A building was insured against fire to the amount of $3000 by A., and to the amount of $2000 by B., in separate policies, each of which contained the following clause: "In case of loss or damage to the property insured, it shall be optional with the company to replace the article lost or damaged with others of the same kind or quality, and to rebuild or repair the building or buildings within a reasonable time, giving notice of their intention to do so within twenty days after having received the preliminary proofs of loss," &c.

The building having been destroyed by fire, A. and B. served a joint notice upon the insured, that they were prepared to rebuild, and requested plans and specifications, which were furnished accordingly. The building having been reconstructed, the insured insisted that the contract to rebuild had not been substantially complied with, and brought an action on the policy against A., claiming to recover the full amount of his original loss: *Held*, that he could not recover.

After the election and notice, a contract to rebuild existed between the parties, of such a kind that the contractor had received the entire consideration in advance. If this contract is not fulfilled by the insurer, he is liable for the damages sustained by the non-fulfilment of the contract, which may be more or less than the amount insured. The action, consequently, should have been brought to recover damages for breach of contract.